79-2081

No.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA,

Respondent,

vs.

EUGENE PHEBUS,

Defendant.

PETITION OF: JAMES INENDINO

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION OF: JAMES INENDINO

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Petitioner, James Inendino, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The unpublished per curiam order of the Court of Appeals is appended to this Petition as Appendix A.

JURISDICTION

The order of the Court of Appeals was entered on May 2, 1980. Petitioner's petition for rehearing timely filed, was denied on June 2, 1980. The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 22.2 of the Rules of this Court.

QUESTION PRESENTED

Whether the Court of Appeals for the Seventh Circuit erred in affirming the District Court's refusal to disclose sealed testimony without articulating reasons therefor.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of counsel for his defence."

STATEMENT OF THE CASE

In February of 1978, petitioner was charged, together with one Thomas McKillip, under Indictment 78 CR 70 with conspiring to violate Title 18, U.S.C. Sec. 2313, interstate transportation of stolen vehicles. Additionally, petitioner was charged under a substantive count within the same indictment. Pre-trial motions were denied and Petitioner alone elected to proceed to trial before the Honorable

Judge Decker and a jury in the Northern District of Illinois, Eastern Division, commencing June 6, 1978.[1]

A guilty verdict was returned as to both Counts I and V against Petitioner on June 12, 1978, after which bail was revoked on that date pending further proceedings which involved a Petition filed by the Government to declare Petitioner a dangerous special offender under Title 18, U.S.C., Sec. 3575.

Thereafter, Petitioner attacked the Government's dangerous special offender Petition, which attack was reviewed and denied in each particular by way of a Memorandum Decision of September 21, 1978, filed by Judge Decker.

On September 21, 1978, Judge Decker imposed sentence upon Petitioner. Petitioner was committed to the custody of the Attorney General for a period of twenty (20) years on each of the two counts on which he was convicted. Concurrent with each other but consecutive to a five (5) year sentence previously imposed under Indictment 76 CR 876.[2]

Pursuant to the Judgment and Finding of Judge Decker, and the invocation of the dangerous and special offender Act, Petitioner appealed to the Seventh Circuit, challenging the propriety of his conviction where the Government propounded prejudicial questions and introduced inadmissible evidence of other crimes, and attacking the constitutionality of the dangerous and special offender Act as

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[1] Co-defendant McKillip was charged in each of the five (5) counts of this indictment. On June 6, 1978, McKillip, represented by separate retained counsel, entered his plea of guilty. Thereafter, McKillip's plea was vacated and he re-pled after an appeal and a confession of error by the Government.

[2] Petitioner was convicted after a jury trial of conspiracy to transport stolen, forged checks in interstate commerce in violation of Title 18, U.S.C., Sec. 371, *et seq.*, before the Honorable Judge Grady on May 5, 1978.

applied. The Seventh Circuit, in a published opinion, affirmed both Petitioner's conviction and the sentence imposed under the Act, finding no error in the Government's conduct and ruling the application of the Dangerous and Special Offender Act constitutional. Petition for Rehearing, timely filed, was similarly rejected. Ultimately, Petition to the Supreme Court of the United States for Writ of Certiorari was denied.

On February 1, 1979, a closed hearing was held before Judge Phil M. McNagny, Jr., in the United States District Court for the Northern District of Indiana, Hammond Division, with regard to a Motion for Reduction of Sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure by one Eugene Phebus, who had been the Government's main witness against Petitioner Inendino at the latter's trials. The following day, Judge McNagny entered his order. Both the Transcript of Proceedings attendant to the February 1, 1979, hearing and the order entered by Judge McNagny were sealed.

On July 23, 1979, Petitioner Inendino moved Judge McNagny for release to him, or to his attorney under a protective order, certain transcripts and court orders sealed by the District Court in connection with the Phebus reduction of sentence request. Judge McNagny denied the motion by order of the same date. No basis for the denial was articulated in the order, nor was there any indication that an in camera inspection was conducted prior to its entry. Petitioner's timely appeal from that order was rejected by the Court of Appeals for the Seventh Circuit. The Court's unpublished per curiam order is appended hereto as Appendix A. Petitioner's timely Petition for Rehearing En Banc was denied, the order of the court is appended hereto as Appendix B.

Petitioner remains in custody while pursuing this Petition.

STATEMENT OF FACTS

Petitioner James Inendino was convicted in May, 1978, in the Northern District of Illinois, of conspiracy to transport stolen, forged checks in interstate commerce in violation of 18 U.S.C. § 371. Petitioner was also convicted in June, 1978, in the Northern District of Illinois, on a conspiracy count and on a substantive count under 18 U.S.C. § 2313, involving interstate transportation of stolen vehicles.

Subsequently the government filed a petition against Inendino seeking to have him declared a dangerous special offender under 18 U.S.C. § 3575. This petition was granted on September 21, 1978, and Inendino was committed to the custody of the Attorney General for a period of twenty years on each of the two counts under 18 U.S.C. § 2313, with the sentences to run concurrently with each other but consecutively with a five-year sentence previously imposed with respect to the forged checks charge.

Both convictions—and the sentence under the Dangerous Special Offender Act—were appealed to the Court of Appeals for the Seventh Circuit and affirmed. Petitions for writs of certiorari to the United States Supreme Court were denied.

Eugene Phebus was one of the principal witnesses in Inendino's two trials as described above. Phebus was a co-defendant in the stolen, forged checks trial in the Northern District of Illinois. At the end of that trial he was placed on supervised probation. Phebus was also a defendant and was convicted in 1976 in the instant proceeding involving a charge of theft and conspiracy in the Northern District of Indiana. He received a five-year sentence in the instant proceeding, and his conviction and sen-

tence were affirmed on appeal. Phebus remained in a status of release on bond at the time of, and after, his conviction.

Within a month of his conviction in the Northern District of Indiana, Phebus agreed to plead guilty in the check fraud case in the Northern District of Illinois, and cooperated and furnished considerable information to the government in that case. As a result of Phebus' cooperation, Petitioner Inendino was added as a defendant in that case; and, in addition, Phebus was placed in the Federal Witness Protection Program, under the auspices of which he continues to be.

On January 22, 1979, Phebus moved for a reduction of his five-year sentence in the instant proceeding, alleging his considerable services by way of cooperation and the provision of information to the government with respect to the two trials and sentencing of Petitioner Inendino. By order dated January 24, 1979, Judge McNagny stayed the execution of Phebus' five-year sentence pending a hearing to be held on February 1, 1979, on the Motion for Reduction of Sentence. A closed hearing with respect to the motion was held on February 1 and an order entered thereon on February 2. The record of the closed hearing and of the order were sealed by Judge McNagny.

On July 23, 1979, Petitioner Inendino filed a motion with Judge McNagny seeking release to him, or to his attorney under a protective order, of transcripts and orders sealed by the district court in connection with the request by Phebus for a reduction of sentence. Judge McNagny denied the motion without articulating any reasons. The Court of Appeals for the Seventh Circuit affirmed.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW, IN AFFIRMING AN UNEXPLAINED REFUSAL TO PROVIDE APPELLANT OR HIS ATTORNEY WITH ANY ACCESS TO CERTAIN SEALED TESTIMONY TAKEN DURING A CLOSED HEARING, SETS A DANGEROUS PRECEDENT NEVER BEFORE REVIEWED BY THIS COURT.

The opinion of the Court of Appeals for the Seventh Circuit affirming the District Court's refusal to disclose sealed testimony and the Seventh Circuit's subsequent denial of rehearing evidence a misapprehension of the law and facts and warrant a grant of certiorari and consideration by this Court.

The Seventh Circuit neglected to consider the importance of open and public civil and criminal proceedings in the American system of justice. As this Court has recently stated:

> "There is no question that the Sixth Amendment permits and even presumes open trials as a norm.
>
> * * *
>
> "It is the practice of western societies, and has been part of the common law tradition for centuries, that trials generally be public.
>
> * * *
>
> "Lower courts cannot assume . . . that they are "free to determine for themselves the question whether to open or close the proceeding' free from all Constitutional constraint." *Gannett Co.* v. *DePasquale,* ..... U.S. ....., 99 S.Ct. ....., 61 L.Ed.2d 608, 625 (1979).

Given the recognized importance of open proceedings, the District Court's action in permanently sealing the transcript of the Phebus hearing, without any comment or explanation whatever, is an alarming precedent. The District Court's action is additionally suspect in that it does not simply bar the public at large, but more importantly bars concerned parties and their attorneys as well. While we contend that the District Court's action is improper per se, certainly the complete denial of access to the requested materials to this petitioner plainly also presents the appearance of impropriety. Quite simply, there have been no cases which have upheld the validity of such action on the part of a district court. This cause should therefore be reviewed both in light of the fact that open proceedings are the norm and not an exception to the norm and most particularly in light of the fact that petitioner has suffered by the non-production of the suppressed material.

The Seventh Circuit appears to have concocted a balancing test in reaching it conclusion that the District Court did not abuse its discretion in refusing to disclose the record of the Phebus production hearing, notwithstanding the fact that absolutely no reasons were advanced for such an extreme action. The Court of Appeals considered, on the one hand, that the material in question would be of "marginal significance" to Petitioner Inendino in seeking to impeach Phebus' testimony, and, on the other hand, that there was a real and probably well-founded concern for Phebus' safety. The Court improperly took it upon itself to do for the first time what should have been done by the District Court below so that, at least, Petitioner would know the reasons for the refusal to disclose the requested material. The Court of Appeals' action was speculative and essentially deprived Petitioner of any meaningful consideration of his motion.

However, assuming for the sake of this petition that it was proper for the Court of Appeals for the first time to speculate on the reasons why the District Court denied disclosure, the Court of Appeals nonetheless improperly weighed these two considerations.

The Court conceded that the requested material has some significance for purposes of impeachment, albeit, in the Court's consideration, marginal. What appears to be minimally significant to the Court of Appeals may be quite significant in fact to Petitioner and his counsel, who are in a better position to assess what is relevant, material and necessary to Petitioner's defense than is the Court. It is important to emphasize in this regard that the Court itself at least found the requested materials to be of some significance to Petitioner.

Moreover, even if, *arguendo,* the requested material is minimally significant for impeachment purposes, it has a further significance in light of Petitioner's right to the substance and form of due process. The requested information undoubtedly relates to the testimony provided by Eugene Phebus in several criminal prosecutions of Petitioner Inendino where Phebus was the chief government witness. The importance of a major witness' credibility in a successful criminal trial cannot be underestimated. In the present case, Phebus' own counsel stated on the face of his motion for reduction of sentence that Phebus' credibility was central to Inendino's convictions. Under such circumstances, "additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *United States* v. *Agurs,* 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Further, the requested material no doubt relates to the information provided by Phebus in conjunction with the Government's Petition to have Petitioner Inendino adjudged a dangerous and spe-

cial offender, pursuant to which Petitioner Inendino was adjudged a dangerous and special offender and sentenced to twenty years' imprisonment.

The second factor considered by the Court of Appeals in its so-called balancing test, the possibility that disclosure of the requested material may jeopardize Phebus' safety, is not supported by the evidence. The Court overlooked or misapprehended the actual circumstances present here: Petitioner Inendino, his counsel, and all involved know and have known the Government's key witness against Petitioner was Eugene Phebus. Phebus' identity has not been secret for nearly five years. In all that time, Phebus has not been so much as threatened or harmed in any manner by Petitioner. Further, it is extremely unlikely that Phebus will be threatened or harmed by Petitioner in the future given that Phebus is apparently under the auspices of the Federal witness protection program. Moreover, Petitioner Inendino is presently incarcerated, and threats directed to Phebus will inevitably cast suspicion on Petitioner and subject him to the strong likelihood of future prosecution and the extension of his already Draconian period of incarceration. Finally, in this context, it should be noted that at the time of Oral Argument, Petitioner's counsel made it plain that Petitioner has no interest in any information concerning the whereabouts of Phebus if such information be contained in the suppressed materials.

In light of the above facts, apparently overlooked by the Court of Appeals, the Court improperly slighted the competing interest involved in denying the Petitioner or at least his counsel at least limited access to the requested materials. In order to rectify a decision which places its imprimatur on the suppression of an otherwise public hearing for no articulated reason to the prejudice of an admittedly interested individual, review must be granted.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604
(Argued: April 1, 1980)
May 2, 1980.

Before
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 79-1883 vs.

EUGENE PHEBUS,

Defendant,

Appeal Of: JAMES INENDINO.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
Nos. H Cr 76-87, H Cr 76-90
Phil M. McNagny, Jr., *Judge.*

ORDER

Appellant James Inendino was convicted in May, 1978, in the Northern District of Illinois, of conspiracy to transport stolen, forged checks in interstate commerce in violation of 18 U.S.C. § 371. Inendino was also convicted in

June, 1978, in the Northern District of Illinois, on a conspiracy count and on a substantive count under 18 U.S.C. § 2313, involving interstate transportation of stolen vehicles.

Subsequently the government filed a petition against Inendino seeking to have him declared a dangerous special offender under 18 U.S.C. § 3575. This petition was granted on September 21, 1978, and Inendino was committed to the custody of the Attorney General for a period of twenty years on each of the two counts under 18 U.S.C. § 2313, with the sentences to run concurrently with each other but consecutively with a five-year sentence previously imposed with respect to the forged checks charge.

Both convictions—and the sentence under the Dangerous Special Offender Act—were appealed to this court and were affirmed. Petitions for writs of certiorari to the United States Supreme Court have been denied.

Eugene Phebus was one of the principal witnesses in Inendino's two trials as described above. Phebus was a co-defendant in the stolen, forged checks trial in the Northern District of Illinois. At the end of that trial he was placed on supervised probation. He was also a defendant and was convicted in 1976 in the instant proceeding involving a charge of theft and conspiracy in the Northern District of Indiana. He received a five-year sentence in the instant proceeding, and his conviction and sentence were affirmed on appeal. Phebus remained in a status of release on bond at the time of, and after, his conviction.

Within a month of his conviction in the Northern District of Indiana, Phebus agreed to plead guilty in the check fraud case in the Northern District of Illinois and cooperated and apparently furnished considerable information to the government in that case. Apparently as a re-

sult of Phebus's cooperation, Inendino was added as a defendant in that proceeding. Inendino is allegedly a significant organized crime figure. Phebus, as a result of his testimony and cooperation, was placed in the Federal Witness Protection Program, and it appears from the record that he is currently under its auspices.

On January 22, 1979, Phebus moved in the instant proceeding for a reduction of his five-year sentence, alleging his considerable services by way of cooperation and the provision of information to the government. He also alleged that "because of the imminent fear of both Eugene Phebus and Mr. Robert Rose [an assistant United States Attorney]" Phebus had been placed in the Federal Witness Protection Program, and it had been necessary for him to leave his home and family. The motion also alleged that Phebus had been fully rehabilitated, was gainfully employed "and [had] attempted to assist the Federal Government at not only great inconvenience to him but also [in the face of] a very serious and real threat of danger."

By order dated January 24, 1979, Judge McNagny stayed the execution of Phebus's five-year sentence pending a hearing to be held on February 1, 1979, on the Motion for Reduction of Sentence. A closed hearing with respect to the motion was held on February 1 and an order entered thereon on February 2.

The record of the closed hearing and of the order were sealed by Judge McNagny. On July 23, 1979, Inendino filed a motion with Judge McNagny seeking release to him, or to his attorney under a protective order, of transcripts and orders sealed by the district court in connection with the request by Phebus for a reduction of sentence. Judge McNagny denied the motion without articulating any reasons, and this appeal followed. We affirm.

Inendino contends that it was error for the district court to refuse to tender to him the sealed testimony or to at least permit his attorney to make an inspection of it under a protective order. Inendino argues that the material sought contains information directly related to Phebus's testimony at the Inendino trials and would be of substantial value for purposes of impeachment. He further contends that disclosure of the sealed material will not endanger Phebus's safety since Phebus's key role in Inendino's prosecution is already well-known and was articulated in the Motion for Reduction of Sentence. Inendino further argues that Phebus's testimony in the Inendino trials was largely uncorroborated and that Phebus had a powerful motivation to testify against him since this testimony would likely result in Phebus's own release, or at least in the substantial mitigation of his sentence. Inendino contends that his due process rights to obtain impeachment material have been infringed, citing *United States* v. *Liebert,* 519 F.2d 542 (3rd Cir. 1975), *cert. denied,* 423 U.S. 985 (1975). He argues that "the courts have traditionally and uniformly opted against secrecy," citing *United States* v. *Harris,* 542 F.2d 1283 (7th Cir. 1976), *cert. denied,* 430 U.S. 934 (1976); and *United States* v. *Schneiderman,* 104 F. Supp. 405 (C.D. Cal. 1952). Here, he contends, the alternative of secrecy was invoked without justification.

The government argues, *inter alia,* that, since the hearing conducted with respect to the Motion for Reduction of Sentence was discretionary, disclosure of the record is not a matter of right. The government points out that Phebus's motion on its face highlights the elements of danger by noting that Phebus has been placed in the Federal Witness Protection Program, that incarceration could endanger him and that his testimony was instrumental in obtaining two convictions of a "significant organized crime figure."

The government also argues that the record of the sentence reduction proceedings is most analogous to presentence reports containing information provided by government informants, where nondisclosure has been upheld. *See United States* v. *Cyphers*, 553 F.2d 1064 (7th Cir. 1977), *cert. denied*, 434 U.S. 843 (1977); *United States* v. *Figurski*, 545 F.2d 389 (4th Cir. 1976).

We have inspected the sealed materials here *in camera* and have concluded that Judge McNagny did not abuse his discretion in refusing to disclose them. We think it would have been better practice for the district court to have stated its reasons for maintaining the secrecy of this material. Upon inspection, however, we conclude that the material in question would be of very marginal significance to Inendino in seeking to impeach Phebus's testimony. Further, we believe the continuing concern for Phebus's safety, which, as the government suggests, is spread on the face of the Motion for Reduction of Sentence, is real and probably well-founded. We think that under all the circumstances, the paramount concern must be the safety of witness Phebus and that a remand to Judge McNagny to restate this central consideration is unnecessary— particularly when, from our own inspection, the materials in question would be of little value to Inendino. Judge McNagny did not abuse his broad discretion in this sensitive matter.

Accordingly, the judgment of the district court is affirmed.

App. 6

Unpublished Per Curiam Order

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 2, 1980

Before
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge

No. 79-1883

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

EUGENE PHEBUS,

Defendant,

APPEAL OF: JAMES INENDINO.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

Nos. M Cr-76-87 & H Cr-76-80

Judge Philip M. McNagny, Jr.

This cause came on to be heard on the transcript of the record from the United States District Court for the

Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the order of this court entered this date.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
June 2, 1980

Before
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge

No. 79-1883

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

EUGENE PHEBUS,

Defendant,

Appeal of: JAMES INENDINO.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

Nos. H Cr 76-87 & H Cr 76-90

Phil M. McNagny, Jr., *Judge.*

ORDER

On consideration of the petition for rehearing and suggestions for rehearing *en banc* filed in the above-entitled cause by James Inendino, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.